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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ILIA DERUM, on behalf of herself and
all others similarly situated,

Plaintiff,

VS.

SAKS & COMPANY, a New York
Corporation, and Does 1-20, inclusive,

Defendant.

Case No. 3:14-cv-01921-JM-JLB

Hon. Jeffrey T. Miller

**DEFENDANT SAKS &
COMPANY'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT ON
PLAINTIFF ILIA DERUM'S
COMPLAINT**

Filed concurrently with Defendant's Memorandum of Points and Authorities in Support Thereof, Statement of Undisputed Material Facts, Request for Judicial Notice, Declaration of Francis S. Lam, Declaration of Teresa Lowry, Declaration of Maria Rodriguez, Joint Stipulation of Facts

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Courtroom: 5D

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

California Labor Code Section 226(a) requires that every employer furnish its employees with wage statements that contain, among other things, the pay period beginning date. Recognizing that the purpose of the wage statement statute is to provide employees with a document that enables them to verify that they were adequately paid, and seeking to harmonize the wage statement statute with the digital age, both courts and the California Division of Labor Standards Enforcement (the “DLSE”) have concluded that electronic wage statements suffice to satisfy Labor Code § 226(a)’s requirements.

During Plaintiff Ilia Derum's brief seven-week employment with Defendant Saks & Company ("Saks"), Saks indisputably provided Plaintiff with electronic wage statements that contained both the beginning and ending dates of every pay period Plaintiff worked. Nevertheless, on July 15, 2014, Plaintiff filed this putative class action lawsuit against Saks alleging that it violated California Labor Code § 226 because in addition to the electronic wage statement she was furnished, Saks also attached to her hard-copy paychecks a stub that, while containing numerous pieces of information, included the pay period ending date but not the beginning date. Plaintiff's cause of action for violation of Labor Code § 226 and derivative cause of action for penalties under the California Private Attorneys General Act ("PAGA"), Labor Code § 2699 *et seq.*, are predicated solely on this absence of the pay period beginning date on Plaintiff's paycheck stubs. Because Plaintiff cannot dispute that Saks did, in fact, provide her with wage statements that contained both the beginning and ending dates of each period for which she was paid in full accord with its obligations under Labor Code § 226(a), Plaintiff cannot raise a triable issue of material fact as to either of her two causes of action against Saks, and summary judgment in favor of Saks should be granted as to the entirety of Plaintiff's complaint.

Moreover, even if Plaintiff could show that Saks failed to provide her with

1 “accurate wage statements” as required by Labor Code § 226, Plaintiff cannot
 2 demonstrate that she suffered any injury as a result thereof—a prerequisite to recovery
 3 under Labor Code § 226. To begin with, that Plaintiff received an additional
 4 document with information regarding her wages did not injure her; if anything, it
 5 benefitted her by providing her with an additional source of information as to her
 6 wages. But, even setting aside her access to electronic wage statements that did
 7 contain pay period beginning dates, it is indisputable that as an employee who was
 8 paid on a weekly basis, Plaintiff could—through her hard copy paystubs alone and, at
 9 most, the use of simple counting back from one week from each pay period end
 10 date—readily ascertain the pay period beginning dates. As such, Plaintiff suffered
 11 absolutely no injury on account of the alleged omission of the pay period beginning
 12 dates on her hard copy paystubs, she cannot satisfy Section 226’s injury requirement,
 13 and summary judgment as to Plaintiff’s claims is proper on this ground as well.

14 **II. Factual Background**

15 Plaintiff was a sales associate at a “Saks Off Fifth” store for Saks. Undisputed
 16 Material Fact (“UF”) 1.¹ Plaintiff began her employment with Saks as an hourly
 17 employee on or around May 6, 2014. Declaration of Maria Rodriguez (“Rodriguez
 18 Decl.”) at ¶ 3. At the commencement of her employment, Plaintiff was provided with
 19 a new associates orientation. Rodriguez Decl. at ¶ 3. During that orientation, Plaintiff
 20 received, reviewed, and kept a copy of Saks’s Associates Handbook. UF 2. That
 21 Associates Handbook stated that employees may access their payroll records,
 22 including their electronic wage statements on Saks’s “Electronic Self Service”
 23 (“ESS”) website, and further provided a link to that website. UF 3, 4. In addition,
 24 Saks posted a flyer in the employee break room at Plaintiff’s store which provided
 25 instructions to Plaintiff and other employees as to what their user identification and

26
 27 ¹ For ease of the Court’s review, Saks has prepared a separate statement of undisputed
 28 material facts, and all evidentiary cites for undisputed material facts are contained in
 that concurrently filed Separate Statement of Undisputed Material Facts.

1 passwords were. UF 5.

2 The Associates Handbook also informed Plaintiff that, as an hourly employee,
 3 she would be paid every Friday. Rodriguez Decl. at ¶ 4, Ex. B; Declaration of
 4 Francis S. Lam (“Lam Decl.”) at ¶ 9, Ex. B. Plaintiff was also informed that her pay
 5 periods ran from Sunday to the Saturday preceding her pay day. UF 16. Accordingly,
 6 it is undisputable that Plaintiff received notice that electronic wage statements existed,
 7 that she had access to those electronic wage statements, that she knew she was paid
 8 weekly on Fridays, and that her pay periods ran from every Sunday to Saturday.

9 In keeping with the realities of the modern digital age, Saks provides all of its
 10 employees with wage statements electronically, which enables employees to easily
 11 access and retrieve those wage statements at their convenience from any computer,
 12 phone, or tablet. Declaration of Teresa Lowry (“Lowry Decl.”) at ¶ 5. During her
 13 brief seven-week employment with Saks, Plaintiff could receive her wages through
 14 direct deposit or through hard-copy paychecks. Lowry Decl. at ¶ 3. Plaintiff did not
 15 opt to receive her wages through direct deposit, so she received her wages through
 16 paychecks instead. Lowry Decl. at ¶ 8. As a result, at the end of every week, Plaintiff
 17 received a paycheck in the mail for her prior week’s earnings. Lowry Decl. at ¶ 8.

18 By virtue of her receipt of hard-copy paychecks, Plaintiff also received, in
 19 addition to electronic wage statements, paystubs that were attached to her checks.
 20 Lowry Decl. at ¶ 8. Between May 16, 2014 and June 20, 2014, Plaintiff received six
 21 paychecks from Saks. UF 7. Those paychecks were dated May 16, 2014, May 23,
 22 2014, May 30, 2014, June 6, 2014, June 13, 2014, and June 20, 2014. UF 8. The
 23 paystubs affixed to those paychecks specified the weekly pay period ending date (UF
 24 17) but not the weekly pay period beginning date.² Joint Stipulation of Facts, filed
 25 concurrently herewith, at ¶ 3. However, for each of those pay periods and paychecks,

26

 27 ² Saks’ payroll records also show that Plaintiff was issued a paycheck on July 3, 2014,
 28 and that the July 3, 2014 paycheck contained both the pay period beginning and end
 29 dates. Lowry Decl. at ¶ 9.

1 Saks also uploaded onto ESS an electronic wage statement that did contain the
 2 beginning dates of those pay periods. UF 9, 10. With her access to Saks's ESS
 3 system, Plaintiff could view the wage statements and/or print out hard copy versions
 4 of her electronic wage statements (either in store or on her own personal computer).
 5 UF 11, 12. Moreover, Plaintiff could also request from her store's human resources
 6 department or manager a copy of her electronic wage statements at no cost to her. UF
 7 12. If Plaintiff had any issues with receiving her electronic wage statements or had
 8 any issues with her receipt of wages, her Selling and Serving Manager or any other
 9 manager and supervisor at her store could have assisted her. UF 13. Whether Saks
 10 violated Labor Code § 226 by providing Plaintiff with an electronic wage statement
 11 that contained the pay period beginning date while also providing Plaintiff with an
 12 additional paystub that did not contain the pay period beginning date is the sole issue
 13 in this case.

14 **III. Procedural Background**

15 Plaintiff filed this lawsuit on July 15, 2014 in San Diego Superior Court. Lam
 16 Decl. at ¶ 2. Plaintiff's original complaint alleged a sole cause of action under
 17 California Labor Code § 226 for Saks's alleged failure to provide itemized wage
 18 statements that contained the beginning date of the pay period for which its employees
 19 were paid wages. Lam Decl. at ¶ 3. Saks then timely removed this action to this
 20 Court on August 15, 2014. Lam Decl. at ¶ 4. On October 24, 2014, with leave of the
 21 Court, Plaintiff filed a First Amended Complaint ("FAC"). Lam Decl. at ¶ 5. The
 22 FAC added a cause of action seeking penalties under the PAGA. Lam Decl. at ¶ 5,
 23 Ex. A. Plaintiff's PAGA claim is based solely on her allegations that Saks violated
 24 Labor Code § 226 by failing to provide wage statements with the pay period
 25 beginning date, and is thus entirely derivative of Plaintiff's Labor Code § 226 claim.
 26 UF 18.

27 On October 31, 2014, the parties appeared before the Honorable Magistrate
 28 Judge Jill Burkhardt. Lam Decl. at ¶ 7. Judge Burkhardt then issued a scheduling

1 order that required Saks to file its Motion for Summary Judgment on the legal issue
 2 concerning its written wage statements by December 19, 2014. Lam Decl. at ¶ 8.

3 **IV. Legal Argument**

4 **A. Legal standard.**

5 Summary judgment is appropriate when the non-moving party “fails to make a
 6 showing sufficient to establish the existence of an element essential to the party’s
 7 case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v.
 8 Catrett, 477 U.S. 317, 322 (1986). The non-moving party cannot rest on “mere
 9 allegations” to demonstrate the existence of a genuine issue of material fact. Fed. R.
 10 Civ. P. 56(e). Rather, the non-moving party must demonstrate the existence of
 11 sufficient facts to create a genuine issue for trial. Anderson v. Liberty Lobby, Inc.,
 12 477 U.S. 242, 250 (1986). Conclusory, speculative testimony in affidavits and papers
 13 is insufficient to raise genuine issues of fact and defeat summary judgment. Thornhill
 14 Publishing Co., Inc. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979).

15 **B. There is no triable issue of material facts as to Plaintiff’s first cause
 16 of action for violation of Labor Code § 226.**

17 **1. Saks is not liable to Plaintiff for violations of Labor Code § 226
 18 because Saks provided her with wage statements that did
 19 contain pay period beginning dates.**

20 Summary judgment on Plaintiff’s Labor Code § 226 claim should be granted in
 21 favor of Saks because Saks indisputably satisfied Labor Code § 226’s requirement that
 22 it furnish Plaintiff with accurate itemized statements in writing that contained the
 23 beginning dates of the periods for which Plaintiff was paid. California Labor Code §
 24 226 states that “every employer shall, either semi-monthly or at the time of each
 25 payment of wages, furnish each of his or her employees . . . an accurate itemized
 26 statement in writing showing . . . (6) the inclusive dates of the period for which the
 27 employee is paid.³ It is well-settled that in lieu of paper statements, employers may

28
 3 Labor Code § 226 also requires a series of other information to be contained on the
 29 itemized wage statement. However, those items of information are not at issue in this
 case, and thus Saks will not discuss them here.

1 furnish employees with electronic wage statements to satisfy its Labor Code § 226
 2 obligations. See Apodaca v. Costco Wholesale Corp., No. CV12-5664 DSF (Ex),
 3 2014 WL 2533427, *2-3 (C.D. Cal. Jun. 5, 2014) (“. . . the provision of an electronic
 4 wage statement in lieu of a paper statement violates Section 226(a) only if Apodaca
 5 could not easily access the wage statements and easily convert the statements into
 6 hard copies”) (internal quotations omitted).

7 Here, Saks undoubtedly furnished Plaintiff with electronic wage statements that
 8 contained the information Plaintiff claims was missing. UF 9, 10. Saks posted those
 9 electronic wage statements on its ESS website, and provided Plaintiff with
 10 instructions for and easy access to those electronic wage statements. UF 2-9. Plaintiff
 11 indisputably could have accessed and obtained those electronic wage statements,
 12 either on her own through use of Saks’s ESS system, or through her store’s managers
 13 and human resources department. UF 11-13. Thus, Saks did furnish Plaintiff with
 14 wage statements containing the inclusive pay period dates in accordance with the
 15 requirements of Labor Code § 226, and Plaintiff’s Labor Code § 226 claim is without
 16 merit.

17 The mere fact that Plaintiff also received an additional detachable paystub to
 18 her paychecks that did not contain the beginning date of the pay periods does not
 19 negate the fact that Saks provided her with wage statements that had the pay period
 20 beginning date (thereby satisfying its obligations under Labor Code § 226 to do so) or
 21 otherwise render Saks in violation of Labor Code § 226. First, Labor Code § 226(a)
 22 plainly states that an employer “shall . . . furnish . . . an accurate itemized statement in
 23 writing” A violation of Labor Code § 226 thus only occurs when an employer
 24 fails to furnish an accurate itemized statement; not when an employer merely provides
 25 one that is inaccurate. Liability attaches only upon the failure to act, not the act of
 26 doing something else.

27 Second, multiple district courts in California have agreed that an employer
 28 satisfies Labor Code § 226 so long as it provides a compliant wage statement, even if

1 the actual paystubs attached to its paychecks did not contain all the information
 2 required by Labor Code § 226. For example, in the recent case of Ruelas v. Costco
 3 Wholesale Corporation, Case No. 5:14-cv-02474, 2014 WL 4421572, at *2 (Sept. 8,
 4 2014, N.D. Cal), the District Court dismissed the plaintiff's Labor Code § 226 claim
 5 despite the fact that the detachable portion of the plaintiff's paycheck failed to state
 6 his name and, like the paystubs at issue in this case, the first day of the pay period.
 7 The District Court held that the California Labor Commissioner has confirmed that the
 8 use of detachable paystubs as an itemized wage statement is no longer necessary, and
 9 that employers may use other forms of writing to provide compliant wage statements.
 10 Id. The District Court then held that because the employer had provided a separate
 11 wage statement that listed out the employee's name and the first day of the pay period,
 12 the employer had satisfied Labor Code § 226's requirements. Id. ("Because Ruelas
 13 received a compliant wage statement, he fails to state a claim for injury under Section
 14 226(a)").

15 Likewise, in Peabody v. Time Warner Cable, Inc., Case No. CV 09-6485 AG
 16 (RNBx) at 7:14-16 (Nov. 1, 2010, C.D. Cal.), the plaintiff alleged that her employer
 17 issued her defective wage statements because the paystubs she received failed to list
 18 her hours worked and the name of the employer—specifically, that it listed Time
 19 Warner Shared Services" instead of "Time Warner Entertainment." See Request for
 20 Judicial Notice ("RJN"), filed concurrently herewith, Ex. A. at 23:12-18. The District
 21 Court, however, nevertheless granted the employer summary judgment as to the
 22 plaintiff's Labor Code § 226 claim because the "[p]laintiff's online wage statements
 23 identified Time Warner Entertainment as her employer." See RJN, Ex. B at 7:17-20.
 24 Collectively, these cases confirm that liability under Labor Code § 226 is based not on
 25 the furnishing of an incomplete or even inaccurate paystub, but the failure to furnish a
 26 complete and accurate wage statement. Here, since Plaintiff's electronic wage
 27 statements contained the pay period beginning dates, and she indisputably had access
 28 to those electronic wage statements, Plaintiff cannot raise a triable issue of material

1 fact as to whether Saks violated Labor Code § 226, regardless of whether her
 2 detachable paystubs failed to contain the pay period beginning dates. Accordingly,
 3 summary judgment in favor of Saks should be granted as to Plaintiff's first cause of
 4 action for violation of Labor Code § 226.⁴

5 **2. Plaintiff cannot recover under Labor Code § 226 because she
 6 cannot demonstrate that she suffered any injury.**

7 Even if the hard-copy paystubs received by Plaintiff were "inaccurate" because
 8 they did not contain the beginning dates of the pay periods, and such an omission did
 9 violate Labor Code § 226 (which it does not), summary judgment should still be
 10 granted in favor of Saks because Plaintiff has no evidence, and thus cannot raise a
 11 triable issue of material fact, as to whether she actually suffered an injury. An
 12 employee may recover under Labor Code § 226 only where she suffered an actual
 13 injury as a result of an employer's violation of Section 226(a). Labor Code §
 14 226(e)(1) (emphasis added). Plaintiff indisputably obtained a wage statement that
 15 contained her pay period beginning date, and cannot claim that she suffered injury.
 16 The mere fact that she obtained an additional document setting forth information
 17 about her wages does not mean she suffered any injury on account of an inaccurate or
 18 incomplete wage statement. If that were the case, any time an employer provides an
 19 employee with an additional payroll document that does not contain all the
 20 information set forth in Labor Code § 226(a) along with the check or direct deposit
 21 statement, the employer would be deemed to violate Labor Code § 226.

22 Moreover, an employee does not "suffer injury" simply because one of the nine
 23 itemized requirements is missing. See Gunawan v. Howroyd-Wright Employment
Agency, 997 F. Supp. 2d 1058, 1066 (C.D. Cal. 2014). In 2013, the California

24
 25 ⁴It should be noted that even if an employer violates Labor Code § 226 by simply
 26 providing an inaccurate wage statement, Saks did not provide Plaintiff with an
 27 inaccurate wage statement. The paystubs attached to Plaintiff's paychecks did not
 28 contain inaccurate information. They did not, for example, misstate the number of
 hours she worked, or contain information that conflicted with the information set forth
 in her electronic wage statements. Thus, the mere omission in Plaintiff's paystubs of
 the pay period beginning date does not give rise to a violation of Labor Code § 226.

1 Legislature amended Labor Code § 226 to state that an employee is deemed to suffer
2 injury for purposes of subdivision (e) if the employer fails to provide accurate and
3 complete information as required by Section 226(a) **and** the employee cannot
4 promptly and easily determine from the wage statement alone one or more of the
5 following: (i) the amount of gross wages or net wages paid to the employee during the
6 pay period or any of the other information required to be provided on the itemized
7 wage statement pursuant to items (2) to (4), (6), and (9) of subdivision (a); (ii) which
8 deductions the employer made from gross wages to determine the net wages paid to
9 the employee during the pay period; (iii) the name and address of the employer . . . ;
10 and (iv) the name of the employee and only the last four digits of his or her social
11 security number or an employee identification number.

12 Here, Plaintiff's weekly pay periods ended every Saturday, she was paid on a
13 weekly basis, and she undoubtedly knew that she was paid on a weekly basis based on
14 her own receipt of her paychecks as well as information provided to her by Saks
15 during orientation and in her employee handbook. UF 14, 15. The paystubs attached
16 to her paychecks also stated the pay period ending date. UF 17. Thus, from just the
17 paystubs alone, Plaintiff could readily identify and ascertain the pay period beginning
18 date by simply counting backwards seven days from the pay period ending date that
19 was on the paystub. At most, simple math is required, and as such Plaintiff cannot
20 show that she suffered any damages by the omission of the pay period beginning date
21 on her paystubs. See Price v. Starbucks Corp, Cal. App. 4th 1136,1142-44 (2011)
22 (holding that employee did not state a cognizable injury under Labor Code § 226
23 because his alleged need to add up his overtime and regular hours on his wage
24 statements to ascertain his total hours worked is not the type of mathematical injury
25 that satisfies Labor Code § 226 injury requirement); see also Alonzo v. Maximus, Inc.,
26 832 F. Supp. 2d 1122, 1135-1136 (C.D. Cal. 2011) (granting summary judgment in
27 favor of employer on claim that wage statements did not contain hourly rate of pay
28 and pay period inclusive dates because the plaintiffs were simply required to perform

1 “simple math” and have not identified any independent injury precipitated by the
 2 defendant’s failure to list the inclusive dates of the pay period). Accordingly, Plaintiff
 3 cannot show that she has suffered injury as a result of the paystubs that did not contain
 4 the pay period beginning date.

5 **3. Plaintiff cannot demonstrate that any failure to include pay
 6 period beginning dates in her paystubs was knowing and
 intentional as required by Labor Code § 226.**

7 Even if Saks violated Labor Code § 226 by issuing hard copy paystubs that did
 8 not include the beginning pay period date, summary judgment on Plaintiff’s Labor
 9 Code § 226 claim is also proper if there is no evidence that Saks’s omission of the pay
 10 period beginning date was knowing and intentional. See Labor Code § 226(e)(1); see
 11 also Hoffman v. Construction Protective Services, Inc., 293 Fed. Appx. 462, 463 (9th
 12 Cir. 2008) (affirming district court’s granting judgment as a matter of law on
 13 employees’ Labor Code §226 because “the record contains no evidence that any
 14 violation of § 226 was knowing and intentional”). Here, Saks included the pay period
 15 beginning dates on its wage statements and advised Plaintiff in numerous ways how to
 16 easily access those statements. UF 2-5, 9, 10. Thus, the omission of pay period
 17 beginning dates on hard-copy paystubs does not qualify as a willful and intentional
 18 violation of Labor Code § 226. Accordingly, summary judgment in favor of Saks
 19 should be granted as to Plaintiff’s Labor Code § 226 claim for the independent reason
 20 that there was no knowing and intentional violation by Saks.

21 **C. Plaintiff cannot raise a triable issue of material fact as to whether
 22 Saks is liable for penalties under the Private Attorneys’ General Act.**

23 Plaintiff’s second cause of action seeking penalties under the California Private
 24 Attorneys General Act also fails as a matter of law because it is predicated solely on
 25 Plaintiff’s assertion that Saks violated Labor Code § 226 by not providing wage
 26 statements with the pay period beginning date. UF 18. Since Saks furnished Plaintiff
 27 with wage statements that contained the pay period beginning date, and thus did not
 28 violate Labor Code § 226 as alleged by Plaintiff, and Plaintiff cannot raise a triable

1 issue of material fact as to whether she suffered any injury or the omission of the pay
2 period beginning date was knowing and intentional, Plaintiff's derivative PAGA claim
3 fails as well and summary judgment in favor of Saks is appropriate. Ruelas, 2014
4 WL 4421572 at *2 ("Because Costco provided a compliant wage statement, Ruelas
5 also does not state a claim for inadequate wage statement penalties under [the Private
6 Attorneys General Act]").

7 **V. Conclusion**

8 For all of the reasons stated above, Saks respectfully submits that the Court
9 should grant summary judgment as to the first cause of action for violation of Labor
10 Code § 226 and second cause of action for penalties under the California Labor Code
11 §§ 2699 *et seq.* (the Private Attorney General Act).

12
13 Dated: December 19, 2014

14 SIDLEY AUSTIN LLP

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